

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

BANK OF UTAH, not in its individual  
capacity but solely as owner trustee,

Plaintiff,

v.

ABC AEROLÍNEAS, S.A. DE C.V.,

Defendant.

Civil Action No. 21 cv 3915

**COMPLAINT**

Plaintiff Bank of Utah, not in its individual capacity but solely as owner trustee (“Bank of Utah” or “Lessor”), for its Complaint against Defendant ABC Aerolíneas, S.A. de C.V. (“ABC” or “Lessee”), alleges through its undersigned counsel as follows:

**Introduction**

1. This is an action for breach of contract arising from leases of two Airbus model A320CEO aircraft to ABC.

2. Under the leases, ABC is required to make monthly payments of Basic Rent and Maintenance Reserves. Beginning in October 2019, ABC ceased making such payments. Based on ABC’s ongoing payment defaults, Lessor terminated the Lease Agreements and repossessed the aircraft in May 2020.

3. As a result of ABC’s defaults, Lessor has suffered damages relating to lost rent and other costs and expenses associated with repossessing the aircraft and exercising its rights under the leases. The damages suffered by Lessor total at least \$83 million.

4. In this action, Lessor seeks to recover all such damages, along with applicable interest and attorneys’ fees.

### **The Parties**

5. Bank of Utah is a state-chartered bank organized under the laws of Utah, having its principal place of business in Utah. Bank of Utah, not in its individual capacity but solely as owner trustee, is the owner of two Airbus model A320CEO aircraft.

6. ABC is a company organized and existing under the laws of Mexico, having its principal place of business at Capitán Carlos León S/N., Zona Federal del Aeropuerto Internacional, “Benito Juárez Ciudad de México” (AICM), Venustiano Carranza, C.P. 15620, Ciudad de México, México. ABC is a commercial airline based in Mexico doing business as “Interjet.”

### **Jurisdiction and Venue**

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because this is an action between a citizen of a state and a citizen of a foreign state, and the amount in controversy, exclusive of interest and costs, exceeds \$75,000.

8. This Court has personal jurisdiction over ABC because ABC consented to the personal jurisdiction of this Court in the Lease Agreements (as defined below).

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because ABC is subject to personal jurisdiction in this District and consented to venue in this District.

### **Relevant Facts**

#### **The Lease Agreements**

10. ABC has leased two aircraft from Lessor pursuant to individual lease agreements that are, for all relevant purposes, identical in substance.

11. Specifically, ABC is a party to (i) a Lease Agreement 10058590 with Lessor, dated as of February 1, 2017, as amended or supplemented, relating to one Airbus model A320CEO aircraft bearing manufacturer’s serial number (“MSN”) 7784; and (ii) a Lease

Agreement 10058591 with Lessor, dated as of February 1, 2017, as amended or supplemented, relating to one Airbus model A320CEO aircraft bearing MSN 7792 (collectively, the “Lease Agreements”). The term of each of the Lease Agreements is 144 months.

12. The Lease Agreements require ABC to make monthly payments of Basic Rent and Maintenance Reserves for each aircraft. The details of such payments are set forth in Section 5 and Schedule 1 to the Lease Agreements.

13. Pursuant to Section 5 of the Lease Agreements, the payments of Basic Rent are due on a monthly basis, with the due date for each month corresponding to the delivery date of each aircraft. These payments were due on the 26th day of each month for MSN 7784 and on the 8th day of each month for MSN 7792. Section 5.6(b) of the Lease Agreements provides that, if the date on which the payment is due is not a Business Day, the relevant amount was due and payable on the immediately preceding Business Day.

14. Pursuant to Section 5 of the Lease Agreements, the payments of Maintenance Reserves for each aircraft were due on the 10th calendar day of each month.

15. The Lease Agreements each contain a “hell or high water” clause (Section 5.14) indicating that ABC’s payment obligations are absolute and unconditional even if, for example, the aircraft are unavailable for ABC’s use for any reason.

16. Pursuant to Section 13.1 of the Lease Agreements, the failure to make any payment of Basic Rent or Maintenance Reserves within two Business Days after the date on which such payment is due is an Event of Default.

17. Upon an Event of Default, Section 13.2 provides that Lessor may take various remedial measures, without prejudice to its other rights. Such measures include, for example, terminating the Lease Agreements, recovering damages and/or repossessing the aircraft.

18. Section 13.3 states that ABC must pay Lessor for various types of damages, in addition to whatever may be required by law. For example, under Section 13.3(a), ABC must pay all Basic Rent and Maintenance Reserves that are then due.

19. Section 13.3(b) provides that ABC must pay Lessor for

any loss (calculated on an after-tax basis) suffered by Lessor because of Lessor's inability to place the Aircraft on lease with another lessee on terms as favorable to Lessor as the terms of this Agreement or because whatever use, if any, to which Lessor is able to put the Aircraft upon its return to Lessor, or the funds arising upon a sale or other disposition of the Aircraft, is not as profitable (calculated on an after-tax basis) to Lessor as this Agreement would have been but for such Event of Default.

20. Section 13.3(c) provides that ABC also must pay Lessor for "any cost or expense incurred in connection with the exercise by Lessor of its remedies under this Agreement, including costs incurred in respect of repossession, insurance, legal services, consulting services, storage and preservation and remarketing of the Aircraft to third parties." Similarly, Section 16.8 of the Lease Agreements provides: "Lessee shall pay to Lessor on demand all expenses (including legal, survey and other costs) payable or incurred by Lessor in contemplation of, or otherwise in connection with, the enforcement of or preservation of any of Lessor's rights under the Operative Documents, or in respect of the repossession of the Aircraft."

21. Section 5.12(a) of the Lease Agreements provides for interest to be paid on any amount payable under the Lease Agreements at the Overdue Rate, which is defined as 7% plus the base commercial lending rate as announced by Citibank, N.A. (or the maximum amount permitted by law). Section 5.12(a) states: "All such interest shall be compounded monthly and calculated on the basis of the actual number of days elapsed assuming a year of 360 days."

22. Section 5.12(b) provides that (i) the Overdue Rate may be increased to 15% plus the base commercial rate as announced by Citibank if at least three Basic Rent or Maintenance Reserves payments are not paid within five days of their respective due dates and (ii) the

Overdue Rate may be increased by an additional 1% for each calendar month in which lessee fails to make any Basic Rent or Maintenance Reserves payment within five calendar days of their respective due dates (to the maximum extent permitted by law).

23. Each of the Lease Agreements is governed by the laws of the State of New York, and provides for non-exclusive jurisdiction over the parties in any state or federal court located in the County of New York.

24. The Servicer under each of the Lease Agreements is Seraph Aviation Management Limited (“Seraph”). In that role, Seraph acted on Lessor’s behalf in managing the Lease Agreements, including by corresponding with ABC.

Payment Defaults by ABC and Termination of the Lease Agreements

25. Pursuant to the terms of the Lease Agreements, ABC made monthly payments of Basic Rent and Maintenance Reserves until the second half of 2019.

26. Beginning in or about October 2019, ABC stopped making monthly payments of Basic Rent and Maintenance Reserves due under the Lease Agreements.

27. On or about November 25, 2019, Lessor and Seraph sent ABC a default notice and payment demand. At that time, the total of the missed payments was \$1,586,356.87.

28. On or about January 28, 2020, Lessor and Seraph sent ABC a second default notice and payment demand relating to additional missed payments in December 2019 and January 2020.

29. On or about February 11, 2020, Lessor sent ABC a third default notice and payment demand for each aircraft. These notices identified additional missing payments.

30. On or about March 31, 2020, ABC returned both aircraft to Lessor in Phoenix, Arizona.

31. On or about May 4, 2020, Lessor sent ABC a Notice of Default, Termination and Acknowledgement of Receipt of Possession of Aircraft for each of MSN 7784 and MSN 7792. In these notices, Lessor terminated its obligations under the Lease Agreements and acknowledged receipt of the aircraft, subject to receipt of further documentation from ABC.

32. ABC's defaults under the Lease Agreements have resulted in substantial damages for Lessor. At the time of termination, ABC had failed to pay more than \$3 million in rent and maintenance. Lessor also has incurred various costs in connection with repossessing, storing, repairing and maintaining the aircraft. Finally, but for ABC's default and termination of the leases, Lessor would have continued to receive rent and maintenance payments from ABC for the remaining term of the contract. These damages total more than \$83 million.

33. In sum, as a direct and proximate result of ABC's breaches of the Lease Agreements, Lessor has suffered at least \$83 million in damages, not including interest or attorneys' fees.

**First Claim for Relief  
Breach of Contract**

34. Lessor repeats and realleges the factual allegations in paragraphs 1 through 33 as if set forth fully herein.

35. Lessor and ABC are parties to the Lease Agreements, which require ABC to make monthly payments of Basic Rent and Maintenance Reserves to Lessor, as well as to indemnify Lessor for various expenses.

36. Lessor has fully performed its obligations under the Lease Agreements, including allowing ABC to possess and use the aircraft leased by Lessor prior to ABC's default.

37. ABC breached each of the Lease Agreements by failing to make payments of Basic Rent and Maintenance Reserves due under the Lease Agreements beginning in

October 2019. These payment defaults were Events of Default under the Lease Agreements.

38. In addition, ABC has breached each of the Lease Agreements by failing to indemnify Lessor for the payment of Basic Rent and Maintenance Reserves and for various other costs incurred by Lessor as a result of ABC's breaches.

39. As a direct and proximate result of such breaches, Lessor is entitled to recover damages of at least \$83 million, not including interest or attorneys' fees.

### **Request for Relief**

WHEREFORE, plaintiff Bank of Utah, not in its individual capacity but solely as owner trustee, requests the following relief:

- a) Judgment against ABC for unpaid Basic Rent and Maintenance Reserves under the Lease Agreements;
- b) Pre-judgment and post-judgment interest as provided by the Lease Agreements and under applicable law;
- c) Indemnification for costs and expenses incurred in connection with enforcing Lessor's rights under the Lease Agreements, including the reasonable legal fees, consulting services, or other costs or expenses associated with pursuing this action; and
- d) Such other relief as the Court may deem just and proper.

Dated: May 3, 2021

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